



**Tiyie v County Assembly Kajiado & another; County Government of Kajiado (Interested Party)
(Constitutional Petition E014 of 2021) [2022] KEHC 11976 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11976 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CONSTITUTIONAL PETITION E014 OF 2021**

SN MUTUKU, J

MAY 26, 2022

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES
10(1),2(A), (B), (C), & 27 OF THE CONSTITUTION OF KENYA 2010.**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
196(1) & (2) OF THE CONSTITUTION OF KENYA 2010.**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
SECTION 48(3) OF THE COUNTY GOVERNMENT ACT**

BETWEEN

NTUSERO NAIMAUA TIYIE PETITIONER

AND

COUNTY ASSEMBLY KAJIADO 1ST RESPONDENT

SPEAKER OF COUNTY ASSEMBLY OF KAJIADO 2ND RESPONDENT

AND

COUNTY GOVERNMENT OF KAJIADO INTERESTED PARTY

RULING

The Application

1. Ntusero Naimaua Tiyie (the applicant) has moved this court through a notice of motion (the application) dated January 17, 2022 seeking the following orders:



- (i) That this application be and is hereby certified as of utmost urgency and the service of the same be dispensed with in the first instance.
 - (ii) That pending the hearing of this application, this honourable court be pleased to issue conservatory orders of prohibition restraining the respondents and the interested party, whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise, from the implementation, further implementation, administration, application and/or enforcement of Kajiado County Villages Delineation Act 2021 (the Act).
 - (iii) That pending the hearing and determination of this petition, this honourable court be pleased to issue conservatory orders of prohibition restraining the respondents and the Interested Party, whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise, from the implementation, further implementation, administration, application and/or enforcement of Kajiado County Villages Delineation Act 2021.
 - (iv) That this honourable court be at liberty to grant any further orders/relief that may be just and expedient.
 - (v) That costs be borne by the respondents.
2. The application is supported by grounds found on the face of it and in the Supporting Affidavit sworn by the applicant where he has deposed that on May 20, 2021 the 1st respondent published in the local daily an advertisement calling for public participation that was to commence on the May 24, 2021; that the same was not published in the County Gazette as required under the law; that the respondents didn't supply adequate copies and that the same was not translated in the language (Maa) that he understands.
 3. He has averred that clause 10(b) and (c) of the Act takes away the right of the residents to participate in protection and maintenance of good governance; that the 1st respondent debated and passed into law the Kajiado County Villages Delineation Bill, 2021 on December 21, 2021; that the 1st respondent lacks the jurisdiction, powers and mandate to delineate boundaries as such powers are a preserve of the Electoral and Boundaries Commission IEBC; that the public participation was only for formality since the views of the public were never taken into consideration in coming up with the Bill; that the Act does not provide for the gender parity rule which is a constitutional requirement and that the Act does not provide for the mechanisms and procedures for appointment, approval and or nomination of the members of the village council.
 4. The applicant averred that the Act tends to give powers to the 1st respondent to determine the remunerations of the village council which is direct usurpation of constitutional powers given to the salaries and remuneration commission; that the Act in granting the village administration powers to directly appoint members of the village council, the 1st respondent is usurping the statutory functions of the County Public Service Board; that the petition raises constitutional issues that are arguable with overwhelming chances of success; that the respondents are in breach of section 48 of the County Government Act by failing to consider the parameters provided by law in creation of a village; that if the impugned law comes into operation, it will render the Petition nugatory and that the provisions of the impugned law are inconsistent with the National Values and principles of good governance as enshrined in article 10 of the Constitution.
 5. The application is opposed. In the replying affidavit dated March 9, 2022 sworn by Francis Nkitoria Sakuda, the Interested Party's County Secretary, it is deposed that application is a misnomer, without legal basis and should be dismissed; that the applicant the has not demonstrated what specific



constitutional provisions shall be violated by the application and implementation of the said Act; that the applicant has clearly stated that public participation was called for in May, 2021 until December, 2022 when the same was passed; that all this while the applicant did nothing in having his views input into the bill and had to wait for the same to be passed in order to frustrate its implementation and that the applicant has only alleged violation by dint of clause 10 of the Act which is ambiguous and yet he seeks to forestall the implementation of the whole Act.

6. It is further deposed that the applicant has not demonstrated any grounds for the grant of conservatory orders sought; that the Act complied with every legal aspect of the law-making process and this has not been contested by the applicant; that the said law is derived directly from the County Government Act hence it is for all intents and purposes an implementation of the said mother Act and that the applicant has not demonstrated what prejudice himself or any other member of the public for that matter, shall suffer if the said orders sought are not granted.

Submissions

7. The matter was canvassed through oral submissions. Mr Kibet, learned counsel for the applicant argued that the Kajiado County Villages Delineation Bill 2021 was enacted on May 5, 2021 and came into force a month after on or about 5th or June 6, 2021; that the petitioner's main ground for challenging the Bill was that the members and residents of Kajiado were never consulted to air their views on the Bill; that section 1 of the said Act provides that the same would come into force 30 days from publication; that the Bill became an Act 30 days after gazettelement and that it beats logic that the public was being called to participate on a Bill which had already become law.
8. It was further argued that the County Assembly Report of the Committee is dated December 21, 2021 as shown in annexure NNT-3, hence showing that at that time the Bill had become law; that the Hansard Report dated December 21, 2021 also demonstrated that the County Assembly was set to debate a Bill that was already operational. It was argued that this demonstrated that public participation was not conducted hence breaching article 196 of the Constitution.
9. The second ground advanced was that the respondents through Section 12 purported to usurp the powers of the Salaries and Remuneration Commission (SRC); that this section is in conflict with section 11 of the SRC Act No 10 of 2011; that there is no evidence that public participation was done or that there was no breach of section 11 of the SRC Act. It was contended that the impugned Act violates section 48 of the County Government Act; that sections 10 and 11 of the said Act are in conflict with article 10 of the Constitution. Further that section 11(b) restricts the village elder to be a person above 35 years and that the same locks out the youth hence discriminating against them.
10. In his submissions, Mr Muga, learned counsel for the 1st and 2nd respondents, opposed the application and the Petition. He argued that the application lacks merit, is frivolous and vexatious. Mr Muga relied on the affidavit sworn by Josiah and filed on March 18, 2022. I wish to state that this affidavit is not in the court file.
11. Counsel argued on four issues. Firstly, he argued that there is material misapplication of facts by the petitioner on the publication of the Act; that the power to legislate matters of the County Government is given to the 1st respondent under article 185(2) of the Constitution; that the power to legislate on village matters is pursuant to section 48 of the County Government Act which allows the 1st respondents to enact a law that would regulate matters of village administration; that the misapplication that was brought by the petitioner is on annexure 2 on the publication of the Bill; that annexure 2 talks about a Bill and not an Act; that the power to gazette a Bill is under article 199 of the Constitution; that before a Bill can be debated or enacted it must be published in the Kenya Gazette and that the same is under



Standing Order No 127 of County Assembly. He argued that the publication was done on May 2021 and that the same was to enable for introduction of the Bill and not enactment to take effect.

12. Secondly, Mr Muga argued on the issue of public participation that it was not true that the participation was done after enactment. He contended that a notice inviting the public for participation is dated May 20, 2021; that public participation occurred for 16 days as per the petitioner's annexure 3. That under page 6 of that report it indicates that the committee sat and invited members of the public to present their views and took into account submissions of all stakeholders. They relied on the case of *Ndegwa vs Nyandarua County Assembly* (2021) eKLR. They argued that going by this case they demonstrated that public participation was done and they met the threshold under articles 180 and 196 and section 87 of the *County Government Act*.
13. Thirdly, they argued that section 53(4) of the *County Government Act* is specific on who to determine salaries of village administrators. They argued that the Bill did not usurp the power of SRC or that of the Boundaries Commission. That section 48 of the *County Government Act* provides that the village units are to be determined by the County Assembly. They argued that as per the committee report the assembly took into account the population size and other factors. That the Bill adopted section 53 of the *County Government Act* on definition of village elders and the qualifications. It was their case that the petitioner's position is not anchored on the law and must be dismissed.
14. Fourthly, it was argued that the petitioner has not disclosed any article of the *constitution* that has been violated. It is trite law that in constitutional petitions the petitioner must plead and show what provision has been violated and adduce evidence on the same. That the application herein does not meet the set threshold and that it should be dismissed.
15. Mr Orongo, learned counsel for the interested party, adopted the submissions by the respondents. He argued that the petitioner missed the difference between Bill and gazette to introduce Bill and gazette to introduce the enactment; that there is no way the Bill would have come to effect without being assented to; that for orders to be granted, basis must be laid and that the petitioner has not shown a *prima facie* case. Further that the petitioner has argued his petition and not the application and that petitioner has not alleged or demonstrated prejudice. Counsel relied on the replying affidavit by the interested party dated March 9, 2022.

Determination

16. I have read the notice of motion application dated January 17, 2022 which is under consideration. I have considered the submissions by all the parties. I have also read the petition which is the main dispute in this matter. The issues that pop out, as argued by the petitioner through his counsel, are that the 1st respondent lacks jurisdiction to delineate boundaries as this power is the preserve of the Independent Electoral and Boundaries Commission; that no public participation was conducted to take views of the public before enacting the Kajiado County Villages Delineation Act; that the Act does not take into account gender parity and the youth; that the Act does not provide appointment or nomination procedures for appointment and approval of the members of the village council; that the 1st respondent does not have power to determine remuneration of members of the Village Council this being a preserve of the Salaries and Remuneration Commission (SRC), and that if the Act is implemented, it will render the petition nugatory.
17. There are no agreed issues by the parties and none were drawn. Therefore this court will determine the above issues which to my mind form the central issues brought about by the arguments of the parties. It is not lost to me that some of the issues torch on both the application under determination and the



main petition. To my mind therefore, some of these issues are better addressed after hearing the parties substantively in the Petition.

18. The applicable principles for granting conservatory orders are well settled. In *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others* {2015} eKLR, the court stated as follows:

“In summary, the principles are that the applicant ought to demonstrate an arguable *prima facie* case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the bill of rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”

19. In *Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board & Others*, Nairobi High Court Constitutional Petition No 154 of 2016 the court summarized the principles as follows:

- (a). An applicant must demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.
- (b) Whether, if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
- (c) the public interest must be considered before grant of a conservatory order.

20. Before I determine whether the petitioner has met the above threshold, I wish to determine the issues I have highlighted above. I have read the *County Governments Act*, No 1 of 2012. Section 48 of that *Act*. For emphasis, that section provides that:

48. Decentralized units

- (1) subject to subsection (3), the function and provisions of services of each county government shall be decentralized to –
 - (a) the urban areas and cities within the county established in accordance with the *Urban Areas and Cities Act* (No 13 of 2011);
 - (b) the sub-counties equivalent to the constituencies within the county established under article 89 of the *Constitution*;
 - (c) the Wards with the county established under article 89 of the *Constitution* and section 26;
 - (d) such number of village units in each count as may be determined by the county assembly of the respective county; and
 - (e) such other or further units as a county government may determine.
- (2) If the constituency or part of a constituency falls under urban areas or cities, that constituency or part of the constituency, as the case may be, shall be considered as falling under subsection (1)(a).



- (3) In establishing a village unit under subsection (1) (d), a county assembly shall take into account the-
 - (a) population size;
 - (b) geographical features;
 - (c) community of interest, historical, economic and cultural ties; and
 - (d) means of communication.
 - (4) A county assembly shall enact legislation to provide for the delineation and establishment of the village units in the county.
 - (5) Nothing in this part may be construed as precluding the county government, through county legislation, from adjusting the units created under subsection (1) for purposes of further decentralizing its functions and provision of its services in accordance with article 176(2) of the *Constitution*.
21. Without belabouring the point, it is clear to me that, given the provisions of the *County Governments Act*, section 48, it is not correct to argue that the 1st respondent lacks jurisdiction to delineate village units. The report of the Ad-hoc Committee on the Consideration of Kajiado County Villages Delineation Bill, on page 5 last paragraph indicates that the Ad-hoc Committee, in exercising its mandate, considered the provisions of section 48 of the *County Governments Act*.
 22. On whether there was public participation, I have noted that the petitioner in his own pleadings has admitted that there was public participation, only claiming that the views of the public were not taken into account by the 1st respondent. It seems that the petitioner has now turned around to claim that there was no public participation. I have read a report of the Ad-hoc Committee on the Consideration of Kajiado County Villages Delineation Bill. From page 6 of that report, the committee conducted public participation fora following an advertisement on May 20, 2021 inviting members of the public to present views, including written memoranda, on the Bill to the committee in specified venues in all the 25 Wards and took into account the submissions presented to it. I have also seen the written submissions by some of the groups attached to the report. It is instrumental to note that it is the petitioner who has attached the report and the various written memoranda of various groups.
 23. On this issue, it is my considered view that by the petitioner's own admission and the annexures to his application, there was public participation. From the report of the Ad-hoc Committee, the views of those who made their submissions seem to have been taken into account. Again, this is an issue that were best determined in finality after hearing the parties in the main petition.
 24. I have noted that the Act is based almost word by word on the *County Governments Act*. For instance the appointment of the Village Administrator under section 5 of the Act is by the Kajiado County Public Service Board. Therefore it is not true to argue that the powers of the County Public Service Board have been usurped or that there is no procedure for appointment or that gender parity rule was not observed. Section 10 of the Act is clear that one of the considerations to be made in appointment of the Village Council is gender balance.
 25. I have considered the issue that the 1st respondent has usurped the powers of the SRC in determining the allowances of the members of the village council as stated section 12 of the Act and as argued by the petitioner. This is a matter that ought to fully be addressed during the hearing of the petition.



26. Will the implementation of the Act render the petition nugatory? I have considered this issue. It is my considered view that nothing would stop a court, upon prove that an Act is unconstitutional, from declaring it so and making necessary orders to that effect.
27. Turning on the issue as to whether the petitioner has met the threshold in granting conservatory orders, I wish to state that I have read the case of [Kevin K. Mwiti & Others v Kenya School of Law & Others](#) [2015] eKLR. The court in that case stated that:
- “The first issue for determination is whether the petitioner has established a *prima facie* case. A *prima facie* case, it has been held, is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the petitioner has to show that he or she has a case which discloses arguable sues and in this case arguable constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a *prima facie* case with a likelihood of success.”
28. The same reasoning is found in the case of [Salma Hemed v Director of Public Prosecutions & 2 others](#) [2020] eKLR where it was stated that:
- “The guiding principles upon which Kenyan Courts make findings on interlocutory applications for conservatory orders within the framework of article 23 of the [Constitution](#) are now fully settled. The law is that, in considering an application for conservatory orders, the court is not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition.
- The next thing to consider is whether unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the [Constitution](#).”
29. The issue of “real danger” was discussed by the court in [Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 others](#) {2014} eKLR, as follows:
- “To those erudite words I would only highlight the importance of demonstration of “real danger.” The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.”
30. The law places the burden on the petitioner to show that there is real danger which is imminent and evident, true and actual, which danger deserves immediate attention or redress by the court.
31. The purpose of granting conservatory orders was stated by the [Judicial Service Commission v Speaker of the National Assembly & Another](#) {2013} eKLR, as follows. that:
- “Conservatory orders are in my view not ordinary civil Law remedies but are remedies provided for under the [Constitution](#), the supreme law of the land. They are not remedies between one individual as against another, but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies



in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders why only attach to a particular person may.”

32. I have given the issues before me in this application considerable attention. To determine fully whether the petitioner deserves the conservatory orders he is seeking, or whether he has met the threshold for grant of such orders, this court requires more than what the Petition has placed before this court. This can only be done after the petitioner presents evidence that satisfies this court that he deserves the orders he is seeking. To take care that the orders I make in this ruling do not prejudice the main petition, I have held back in making a determination whose result will be what I am trying to avoid. There is a pending petition. I need to take care that it is not rendered nugatory.
33. For that reason, and taking into account that the petitioner will not be prejudiced even if the impugned Act is implemented given that this court is clothed with powers to make orders whose result would be to make good the negatives that the implementation of the Act will have done, it is my considered view that the petition has not satisfied this court that he deserves the orders he is seeking at this interlocutory stage. Consequently, I decline to grant the orders sought in the notice of motion dated January 17, 2022. That notice of motion is hereby dismissed with costs to the respondents in any event.
34. Let parties comply with procedure and set the petition down for hearing.
35. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 26TH MAY 2022.

S. N. MUTUKU

JUDGE

